

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

DERRIC MEREDITH RICK GENE STITT,)	Case No.: 1:20-cv-00153-NONE-JLT (HC)
)	
Petitioner,)	FINDINGS AND RECOMMENDATION TO
)	GRANT RESPONDENT’S MOTION TO DISMISS
v.)	
)	
M. SPEARMAN, Warden,)	(Doc. 15)
)	
Respondent.)	TWENTY-ONE DAY OBJECTION DEADLINE
)	
)	

On December 17, 2019, Petitioner filed the instant federal petition for writ of habeas corpus. (Doc. 1.) The United States District Court for the Northern District of California transferred the case to this Court on January 29, 2020. (Doc. 5.) The Respondent has moved the Court to dismiss the action as untimely. (Doc. 15.) The Court finds the petition to be untimely and recommends that it be **DISMISSED** with prejudice.

DISCUSSION

I. Procedural Grounds for Motion to Dismiss

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court. . .” Rule 4 of the Rules Governing Section 2254 Cases.

The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the state’s

1 procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to
2 evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d
3 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state
4 procedural default). Thus, a respondent can file a motion to dismiss after the court orders a response,
5 and the court should use Rule 4 standards to review the motion.

6 Respondent's motion to dismiss is based on a violation of 28 U.S.C. 2244(d)(1)'s one-year
7 limitation period. Because Respondent's motion to dismiss is similar in procedural standing to a
8 motion to dismiss for failure to exhaust state remedies or for state procedural default and Respondent
9 has not yet filed a formal answer, the Court will review Respondent's motion to dismiss pursuant to its
10 authority under Rule 4.

11 II. Limitation Period for Filing Petition for Writ of Habeas Corpus

12 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
13 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus
14 filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114
15 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997). The instant petition was
16 filed on December 17, 2019, and thus, it is subject to the provisions of the AEDPA.

17 The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal
18 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). In most cases, the limitation period begins
19 running on the date that the petitioner's direct review became final. In this case, Petitioner did not
20 appeal his March 17, 2017 judgment after his resentencing. Therefore, Petitioner's conviction became
21 final sixty days after he was resentenced when the time for filing a direct appeal expired, or May 16,
22 2017. The statute of limitations commenced on the following day on May 17, 2017. Absent
23 applicable tolling, the last day to file a federal habeas petition was May 16, 2018, though Petitioner did
24 not file it until December 17, 2019.

25 III. Statutory Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

26 Under the AEDPA, the statute of limitations is tolled during the time that a properly filed
27 application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. §
28 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules

governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531 U.S. 4, 8 (2000). An application is pending during the time that “a California petitioner completes a full round of [state] collateral review,” so long as there is no unreasonable delay in the intervals between a lower court decision and the filing of a petition in a higher court. Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), *abrogated on other grounds as recognized by* Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008) (*per curiam*); *see* Evans v. Chavis, 546 U.S. 189, 193-194 (2006); Carey v. Saffold, 536 U.S. 214, 220, 222-226 (2002); Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

Petitioner did not file any state collateral actions after he was resentenced. Therefore, Petitioner is not entitled to statutory tolling, and the instant petition remains untimely.

IV. Equitable Tolling

The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable tolling in appropriate cases. *See* Holland v. Florida, 560 U.S. 631, 651-652 (2010); Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). Equitable tolling may be granted when “extraordinary circumstances beyond a prisoner’s control make it impossible to file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir. 2005) (internal quotation marks and citations omitted). “When external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” Holland, 560 U.S. at 655; Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002) (citation omitted). Consequently, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at 1107.

Petitioner claims he has had “considerable mental health issues over the years . . . that made it impossible for him to pursue habeas relief in a timely manner.” (Doc. 12 at 13-14.) However, as Respondent argues, Petitioner fails to prove his allegation by including details of the exact nature of his alleged mental illness, the precise time period he suffered from any impairments, and how they

1 The parties are advised that failure to file objections within the specified time may waive the
2 right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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4 IT IS SO ORDERED.

5 Dated: May 19, 2020

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE